No. 06-

IN THE

Supreme Court of the United States

DEADRIA FARMER-PAELLMANN on behalf of herself and other similarly situated persons of African-American slave descent and the class she represents,

Petitioners,

v.

BROWN & WILLIAMSON TOBACCO CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CARL J. MAYER, ESQ.
MAYER LAW GROUP LLC
66 Witherspoon Street
Suite 414
Princeton, NJ 08542
(609) 921-0253

BRUCE I. AFRAN
Counsel of Record
10 Braeburn Drive
Princeton, NJ 08540
(609) 924-2075

Attorneys for Petitioners

208626

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether Fourteenth Amendment due process requires an evidentiary hearing to determine if the period of limitations must be equitably tolled to permit slave descendants to bring actions against banks and insurance companies for disgorgement of profits (earned in contravention of Northern anti-slavery laws) from slave financing and slave insurance?

Did the courts below fail to protect plaintiffs' Fourteenth Amendment due process rights by failing to conduct an evidentiary inquiry as to tolling of the period of limitations before dismissing the action?

Do the children of former U.S. slaves and other slave descendants have standing to bring actions seeking disgorgement by banks and insurance companies unjustly enriched via slave financing and slave insurance profits under state law equity principles?

PARTIES TO THE PROCEEDINGS

Petitioners

Deadria Farmer-Paellmann on behalf of herself and other similarly situated persons of African-American slave descent and the class she represents.

Respondents

FleetBoston Financial Corporation, CSX Corporation, Aetna Inc., Brown Brothers Harriman & Company, New York Life Insurance Company, Norfolk Southern Corporation, Lehman Brothers Corporation, Lloyd's of London, Union Pacific Railroad, JP Morgan Chase, R.J. Reynolds Tobacco Company, Brown and Williamson, Liggett Group Inc.,Canadian National Railway, Southern Mutual Insurance Company, American International Group ("AIG"), and Loews Corporation.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Cited Authorities iv

Table of Appendices vii

Opinions Below 1

Jurisdiction 1

Relevant Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Petition 9

A. The Courts Below Are At Odds With Rulings In Other Circuits Requiring A Hearing As To The Tolling Of A Statute Of Limitations. The Supreme Court Needs To Resolve This Split. 10

B. The Supreme Court Must Decide The Limits Of Article III Standing. 19

Conclusion 22

TABLE OF CITED AUTHORITIES

Page

Cases:

Aldrich v. McCulloch Properties,
627 F.2d 1036 (10th Cir. 1980) 10, 11, 12

Allen v. Wright,
468 U.S. 737 (1984) 17

Beaird v. Seagate Tech.,
145 F.3d 1159 (10th Cir. 1998) 10, 12, 13, 16

Bensman v. United States Forest Service,
408 F.3d 945 (7th Cir. 2005) 10

Coons v. Mineta,
410 F.3d 1036 (8th Cir. 2005) 10, 11, 15

Delmar v. Raytheon Aircraft Corp.,
1996 U.S. Dist. LEXIS 12913, No. 96-1002-JTM,
1996 WL 499144 (D. Kan. Aug. 9, 1996) 12, 16

Dement v. Olin-Mathieson Chemical Corp.,
282 F.2d 76 (5th Cir. 1960) 19

Hall v. E. I. Du Pont de Nemours & Co.,
345 F. Supp. 353 (E.D.N.Y. 1972) 19, 20

Idaho v. Coeur D'alene Tribe of Idaho,
521 U.S. 261 (1997) 11

Cited Authorities

Page

In re Agent Orange Product Liability Litigation,
597 F. Supp. 740 (S.D.N.Y. 1984) 21

James v. Bessemer Processing Co.,
155 N.J. 279 (1998) 20, 21

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1990) 18

Lujan v. National Wildlife Federation,
497 U.S. 871 (1990) 18

Mandarino v. Mandarino,
2006 U.S. App. LEXIS 11927 (2d Cir. 2006) ..
..... 10, 11, 15

Melendez-Arroyo v. Cutler-Hammer de P.R. Co.,
273 F.3d 30 (1st Cir. 2001) 10, 12, 16

Montenegro v. United States,
248 F.3d 585 (7th Cir. 2001) 10

Seneca Nation of Indians v. New York,
26 F. Supp. 2d 555, *aff'd*, 178 F.3d 95
(2d Cir. 1999), *cert. denied*,
New York v. Seneca Nation of Indians,
528 U.S. 1073 (2000) 11

Sholtis v. American Cyanamid Co.,
238 N.J. Super. 8; 568 A.2d 1196
(App. Div. 1990) 20, 21

Cited Authorities

Page

Thompson v. Metropolitan Life Insurance Company, 149 F. Supp. 38 (S.D.N.Y. 2001) 13, 14, 15

United States v. Battles, 362 F.3d 1195 (9th Cir. 2004) 15-16

United States v. Battles, 362 F.3d 1195 (9th Cir. 2004) 10, 11

Warth v. Seldin, 422 U.S. 490 (1975) 17

United States Constitution:

Fourteenth Amendment ii

Statutes:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1982 1

Rest. 2d Torts § 433B (1965) 20

Other Authorities:

Edgar J. McManus, *Black Bondage in the North* 174 (1973) 4, 14

Kenneth M. Stampp, *The Peculiar Institution: Slavery in the AnteBellum South* 397 (1956) 4, 14

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Decided December 13, 2006 ..... 1a

Appendix B — Opinion And Order Of The United States District Court For The Northern District Of Illinois, Eastern Division Dated July 6, 2005 ... 19a

Appendix C — Judgment Of The United States District Court For The Northern District Of Illinois, Eastern Division Dated July 6, 2005 ... 142a

OPINIONS BELOW

The Court of Appeals for the Seventh Circuit in an opinion dated December 13, 2006 reversed in part and modified and affirmed in part and remanded to the District Court. The Court of Appeals for the Seventh Circuit, in reversing, ruled that plaintiffs consumer protection claims could proceed but affirmed that the plaintiffs other claims must be dismissed because the statute of limitations had expired and because plaintiffs have no standing.

The opinion is attached as Appendix A.

The District Court Opinion and Order dated July 6, 2005 dismissed all of plaintiff's claims with prejudice. This opinion is attached as Appendix B.

JURISDICTION

The Court of Appeals for the Seventh Circuit in an opinion dated December 13, 2006 reversed in part and modified and affirmed in part.

The District Court Opinion and Order dated July 6, 2005 dismissed all of plaintiff's claims with prejudice

Mr. Justice Stevens granted an extension until May 12, 2007 for the filing of this petition for writ of certiorari; since May 12, 2007 falls on a Saturday, it is timely filed on May 14, 2007.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

Jurisdiction below was based on diversity and 42 U.S.C. § 1982.

RELEVANT PROVISIONS INVOLVED

See attached appendix.

STATEMENT OF THE CASE

Deadria Farmer-Paellmann – the lead plaintiff in this litigation – may well become known to future generations as the "Rosa Parks" of the movement to seek restitution from corporations that illegally profited from the heinous institution of American slavery.

Ms. Farmer-Paellmann is a descendant of the Gullah Gechee people: a homogenous group of slave descendants from the coastal regions of Georgia and South Carolina. Her maternal great-great grandfather and great-great grandmother, Abel and Clara Hines, toiled as slaves on a rice plantation on Saint Helena Island, a sea island in Beaufort County, South Carolina. Her African ancestry (identified by DNA testing) links Ms. Farmer-Paellmann to the Mende ethnic group of Sierra Leone.

Ms. Farmer-Paellmann's mother, Wilhelmina Farmer, a divorced mother of six, raised her daughters alone on a limited income in depressed East New York. Eventually, the family moved to the predominantly white neighborhood of Benson Hurst, Brooklyn where they experienced racism first-hand. They were harassed constantly, Farmer-Paellmann told the *New York Times* in an interview, and subjected to physical violence. "Probably not a day went by when I didn't hear [a racial slur]. It seemed like every time the window was repaired, something would get thrown through it again."

Ms. Farmer-Paellmann decided to give up pursuing her talent for classical music and instead earned a degree in political science from Brooklyn College and a masters degree

from George Washington University. In 1992 she participated in a vigil near Manhattan's City Hall. She and the other protesters were trying to prevent the excavation of a seventeenth-century African burial ground in order to create a new parking lot. She was allowed onto the site one day, where some 20,000 black Americans had been laid to rest generations earlier, and realized that they, too, "lived, worked and died in this city, and they never got their reparations," she told the *New York Times*. "It moved me."

Motivated by this event and her own family's history, Ms. Farmer-Paellmann decided to obtain a law degree in order to pursue the cause of reparations. She obtained her degree from the New England School of Law in 1999 but had by then learned that various claims for reparations from the United States government had been denied either by the Judicial or Legislative branches. It was while doing her own genealogical research for a paper on reparations that Ms. Farmer-Paellmann hit upon the idea that is the subject of this case: What was the involvement, if any, of American corporations in the institution of slavery and what was their legal liability?

Ms. Farmer-Paellmann invested her life's work pursuing a legal claim for reparations from corporations that unjustly enriched themselves by trafficking and even holding human slaves.

Only after extensive archival, genealogical and legal research did Ms. Farmer-Paellmann uncover the possibility that the corporations named as defendants may have participated in financing, insuring and underwriting not only the slave trade but the operations of ante-bellum plantations.

Because some of the records were vague or ambiguous, Ms. Farmer-Paelmann spent years writing and phoning corporations that her research indicated might have participated in slavery. She was met with repeated denials, delays and obfuscation.

Her difficulty obtaining records motivated major American cities and States – including California, Philadelphia, Chicago and Los Angeles — to pass legislation requiring corporations to disclose their participation in slavery before those corporations could be awarded city contracts. One government mandated disclosure report listed her great-great grandfather Abel as an insured by Aetna.

Both the District Court and the Appellate court below predicate their rulings that plaintiffs claims are time barred – and therefore that plaintiffs have no standing – on the premise that African-Americans knew as early as the 1950s that corporations financially underwrote slavery. Seventh Circuit judges Posner, Easterbrook and Manion write: "And it's not as if it had been a deep mystery that corporations were involved in the operation of the slave system." *See* Appendix A at p. 15a *citing e.g.*, Edgar J. McManus, *Black Bondage in the North* 174 (1973); Kenneth M. Stampp, *The Peculiar Institution: Slavery in the AnteBellum South* 397 (1956).

None of the corporate defendants named in this litigation are mentioned in the academic studies of slavery cited by the Seventh Circuit; indeed, those tomes merely mentioned generally that Northern corporations were involved with Southern slavery.

The Seventh Circuit would have Americans believe that once an academic wrote a book in the 1950s African-

Americans should have been on notice of claims against unnamed corporations. They would have us further believe that African-Americans at the time had the capacity to forgo the struggle to obtain decent schooling, to obtain equal access to public accommodations, to obtain equal access to courts and to even secure the right to vote in order to file a claim against unspecified financial institutions. Only a jurisprudence devoid of historic sensibility could claim that African-Americans in the 1950s and 1960s — worried about being beaten, lynched, shot with water cannons and set upon by dogs – had the capacity to unearth the hidden history of illegal (under Northern laws) corporate slave operations in libraries that denied African-Americans entrance.

Even with all of the hard-fought civil rights achieved by her ancestors, Ms. Farmer-Paellmann has had to devote her life and make Herculean efforts to uncover the little truth that is known about the involvement of these defendants in the vicious institution of slavery. Despite these efforts, the defendant corporations persistently engaged in fraudulent and misleading efforts to deny their involvement in slavery.

Perhaps most dastardly were the public false statement made by representatives of the JP Morgan Chase Bank denying, as late as March 5, 2004, that they were at all involved in slavery. Here is what Frederick Hill, JP Morgan Chase Vice President, testified before the City Council of Chicago on that date:

> The research revealed no evidence to support the allegations that predecessor banks of Chase issued, underwrote, or financed slave-related insurance. We also found no evidence that any predecessor banks of Chase financed the slave trade or otherwise profited from slavery. In

> addition, Chase went beyond the allegations in Ms. Farmer-Paellmann's letter, and found that there is no evidence that any predecessor bank issued, underwrote, financed or profited from insurance issued on the lives or persons of slaves.

Only months later, on January 20, 2005, JP Morgan Chase released a letter indicating that this statement was a lie:

> Recently, JP Morgan Chase completed extensive research examining our corporate history for any links to slavery to meet a commitment to the City of Chicago. We are reporting that this research found that between 1831 and 1865 two predecessor banks . . . accepted approximately 13,000 enslaved individuals as collateral on loans and took possession of approximately 1, 250 enslaved individuals.

JP Morgan Chase went on to apologize for its role in slavery and agreed to contribute to a scholarship fund. But apologies and charitable work ought not to obfuscate the hard legal liabilities involved; disgorgement of the profits that JP Morgan Chase's predecessor bank earned financing and owning slaves is the proper remedy under the law.

After telling Ms. Farmer-Paellmann and the City of Chicago that JP Morgan Chase had no involvement in slavery, it actually turns out that the bank was a slave owner as well as a slave financier.

In denying, on March 5, 2004, any involvement in slavery, JP Morgan Chase bank indicated the extraordinary effort it undertook to research the historical record:

"Our research spanned two continents, three countries, seven U.S. States and the District of Columbia, and included major public and university collections, as well as in over 25 state and local historical archives."

Either Chase was deceiving Ms. Farmer-Paellmann and the legal system with its earlier denials and should be estopped from asserting a statute of limitations defense. Or Chase was being forthright about the difficulty of uncovering corporate involvement in the institution of slavery, in which case it should also be estopped from asserting a defense that plaintiffs sat on their rights. Put bluntly: How can a multinational corporation with bountiful resources tell Ms. Farmer-Paellmann and other African-Americans that they should have know years ago about corporate profiteering from slavery, when it took until 2005 for JP Morgan Chase to uncover or finally admit the truth?

The first complaint filed by Ms. Farmer Paellmann was on March 26, 2002. She was careful to file it within the two year statute of limitations after she began to learn in 2000 that some of the defendants might have been involved in financing slavery. Far from sitting on their rights, it is inconceivable that African-Americans could have filed a complaint before the painstaking, lengthy, improbable research assembled by Ms. Farmer-Paellmann emerged.

Contrary to intimations in the opinions below, plaintiffs specifically pled fraud and concealment by the defendant corporations. The following are excerpts from the plaintiffs Second Consolidated And Amended Complaint:

> 51. The nature of the complained of business dealings by the defendants, as discussed in more detail in those portions of this

Complaint, establishes that they were self-concealing from the enslaved African and African-Americans an by direct extension their descendents . . .

52. A number of the defendants have also over the years specifically and falsely denied having any connection to slavery.

53. The defendants have also fraudulently concealed the facts . . . from the heirs or the estate of the slaves and former slaves harmed by the defendant's participation in slavery. No defendant had disclosed any facts before two years prior to the filing of these suits which would provide the plaintiffs with notice of any facts of the cause of action as plead within this complaint . . .

54. Despite efforts, the plaints have been unable to secure records from a number of the defendants with regards to their ancestors due to the failure of most, if not all, to be able to reliably access documents establishing business relationships, ventures and dealings, contracts, shipping manifests, human cargo list that may directly connect the plaintiffs with their slave ancestors and their free ancestors . . .

55. Recent advanced in Internet and computer databases have made some of these records more accessible . . .

> 56. The defendants were unjustly enriched by the labor of plaintiff's ancestors and defendants actively concealed evidence of this participation in slavery and their conduct was instrumental in keeping plaintiffs fro obtaining the knowledge necessary to be aware of or on notice of the harms they suffered as a direct result of defendants conduct . . .

REASONS FOR GRANTING THE PETITION

This case presents an important issue of constitutional law deriving directly out of this nation's slave trade that will forever evade review if not heard by this Court. Remedy by disgorgement against those U.S. corporations still in existence that traded in slaves is a matter of intense public interest for vast numbers of Americans, particularly African-American slave descendants.

In affirming the dismissal by the District Court, the Seventh Circuit disregarded prevailing due process requirements that an evidentiary hearing be held where there is a disputed issue as to tolling the statute of limitations. The result of the affirmance, disregarding clear and non-ambiguous precedent, is that the question of disgorgement by defendants of slave trading profits earned from the American trade in human beings will never be heard in the federal courts and these questions will be forever silenced. Public interest in this question is intense as evidenced by the recent movement of states to apologize for slavery, a debate that has been consonant with the history of this litigation.

A. The Courts Below Are At Odds With Rulings In Other Circuits Requiring A Hearing As To The Tolling Of A Statute Of Limitations. The Supreme Court Needs To Resolve This Split.

The decision below is in direct conflict with rulings in other circuits that a claim that the statute of limitations is to be tolled is a factual question requiring an evidentiary hearing. *Melendez-Arroyo v. Cutler-Hammer de P.R. Co.*, 273 F.3d 30, 39 (1st Cir. 2001); *Mandarino v. Mandarino*, 2006 U.S. App. LEXIS 11927, 7-8 (2d Cir. 2006); *Aldrich v. McCulloch Properties*, 627 F.2d 1036, 1042 (10th Cir. 1980); *Coons v. Mineta*, 410 F.3d 1036, 1040-1041 (8th Cir. 2005); *United States v. Battles*, 362 F.3d 1195, 1198 (9th Cir. 2004); *Beaird v. Seagate Tech.*, 145 F.3d 1159, 1175 (10th Cir. 1998). By effectively reversing its own practice recognizing such hearings, *see Bensman v. United States Forest Service*, 408 F.3d 945 (7th Cir. 2005) and *Montenegro v. United States*, 248 F.3d 585 (7th Cir. 2001), the Seventh Circuit placed itself in a direct conflict with other circuits that have considered this question.

Judge Posner concluded "that tolling doctrines can extend the time to sue well beyond the period of limitations – *but not to a century and more beyond.*" 471 F.3d at 762. No authority was offered by either the District Court or the Court of Appeals for this holding and there is no principled reason why an action against an extant corporation cannot lie at such a distance.[1]

---

1. The Seventh Circuit does not dispute that" purported representatives had a right to sue on behalf of their ancestors, and the defendants offer only a perfunctory rebuttal." App. at 14a. And federal courts have adjudicated disputes that are far older than 150

(Cont'd)

Being without authority, the affirmance is a major departure from accepted notions of due process recognized by every circuit – the First, Second, Eighth, Ninth and Tenth – that has considered whether an evidentiary hearing is required in a disputed issue of tolling the period of limitations. *See e.g.*, *Aldrich v. McCulloch Properties*, 627 F.2d at 1042 ("[W]hether a plaintiff should have discovered the basis of his suit under the doctrine of equitable tolling does not lend itself to determination as a matter of law . . . Dismissal of the securities claims on the pleadings was, therefore, improper."); *Mandarino v. Mandarino*, 2006 U.S. App. LEXIS at 7-8 (". . . the District Court should not have resolved the fact-specific equitable tolling issue on defendants' motion to dismiss."); *Coons v. Mineta*, 410 F.3d at 1040-1041 (reversing dismissal because District Court failed to hold evidentiary hearing on question of equitable tolling in discrimination action); *United States v. Battles*, 362 F.3d at 1198 (Because equitable tolling issues "are highly fact-dependent . . . we remand . . . to the District Court with instructions that it develop an adequate evidentiary record before again determining whether the statute of limitations

---

(Cont'd)

years. The Supreme court has ruled that no statute of limitations applies to Indian Land claims, many of which are still being adjudicated in the 21st century over facts that took place in the 17th and 18th centuries. *Seneca Nation of Indians v. New York*, 26 F. Supp. 2d 555, *aff'd*, 178 F.3d 95 (2d Cir. 1999), *cert. denied*, *New York v. Seneca Nation of Indians*, 528 U.S. 1073 (2000). The court in this case granted summary judgment for the Seneca nation and after settlement talks, the nation received land that had been illegally taken from it. *See also Idaho v. Coeur D'alene Tribe of Idaho*, 521 U.S. 261 (1997). Thus, there is no practical barrier to adjudication of actions reaching, as Judge Posner put it, "to a century and more beyond", especially when, as here, the facts have now been admitted.

should be equitably tolled as to those claims.); *Melendez-Arroyo v. Cutler-Hammer de P.R. Co.*, 273 F.3d at 39 (directing that District Court hold hearing on equitable tolling claims); *Beaird v. Seagate Tech.*, 145 F.3d at 1175, *quoting Delmar v. Raytheon Aircraft Corp.*, 1996 U.S. Dist. LEXIS 12913, No. 96-1002- JTM, 1996 WL 499144, at *7 (D. Kan. Aug. 9, 1996) ("Tenth Circuit cases 'indicate a detailed factual inquiry is necessary to determine whether equitable tolling should be applied,' requiring 'in all likelihood, an evidentiary hearing' ".).

By ruling as they did, both the District Court and the Seventh Circuit made an effective finding of fact on a motion to dismiss that no basis exists on which the period of limitations ought to be tolled, a matter for which due process requires a detailed factual inquiry, *Beaird v. Seagate Tech.*, 145 F.3d at 1175, that "does not lend itself to determination as a matter of law", *Aldrich*, *supra*, and is improper for adjudication on a motion to dismiss. *Mandarino*, *supra*. By determining the non-availability of tolling without an evidentiary hearing, the Seventh Circuit and the district judge disregarded not only the precedent of every circuit that has considered this question, but also the prevailing practice in the Seventh Circuit. *Bensman and Montenegro*, *supra*.

Both the Seventh Circuit and the district judge seem to be burdened with the blinders of late 20th century liberality in their belief that these actions could have been commenced at any earlier date; such perspective conceals the reality of history in favor of a idealized version of American jurisprudence that never existed until the very recent past. Just when the former slaves or their descendants possessed sufficient knowledge as to the defendants' slave financing acts so as to be able to commence the action is a highly

specific question requiring "a detailed factual inquiry" as to whether equitable tolling should be applied". *Beaird, supra.* No defendant made any admissions as to their slave-trading and slave financing past until 2002 *at the earliest*, the year these actions were filed, and while several historical treatises did allude to the involvement of northern merchants and banks in the slave trade, 471 F.3d at 762, none of these identify the acts of these defendants that were not acknowledged until at least 2002. Moreover the knowledge of specialists such as Kenneth Stampp cannot be fairly imputed to the descendants of the freed slaves in the absence of public admissions by defendants of their slave financing conduct. . Defendants' conduct is the very example of "self-concealing" conduct that gives rise to tolling, regardless of the passage of time. *Thompson v. Metropolitan Life Insurance Company*, 149 F. Supp. 38, 54 n.18 (S.D.N.Y. 2001).

The factual impediments to the former slaves' action was well-known and need little explication: slaves were universally denied under strict criminal and corporal penalty the right to read or be educated and were wholly ignorant of the financial industry that made slavery possible; schools for the freed slaves were largely non-existent; freed slaves and their descendants until the early 1960's had virtually no access to the political system and their testimony against whites was rarely honored or heard in most parts of the country, access to the courts was difficult and often life-threatening, a fact acknowledged by the Seventh Circuit, 471 F.3d at 762, and few lawyers took cases on behalf of African-Americans for any purpose let alone rectifying the stolen wages of slavery.

While it is true as Judge Posner suggests that *some* courts in both the north and the south in the early 20th century would

have provided forums for slave descendants, no facts as to the specific acts of defendants were publicly available until at least 2002, the year this action was commenced.

Most tellingly, the defendants themselves concealed their slave trading acts from their own public filings and other public sources. For example, it was not until August 2005 that defendant Bank of America acknowledged any of its slave-financing past. Defendant JP Morgan Chase made no such acknowledgment until January, 2005 when forced to do so by the Chicago City Council as a condition for continued city contracts. New York Life and Aetna concealed their slave trading past until forced to do so by California insurance regulators in 2002. The Court of Appeals and the District Court before it ignored these evident factual issue with a broad brush asserting vaguely: "And it's not as if it had been a deep mystery that corporations were involved in the operation of the slave system". App. at 15a. The entire support for this assertion by Judge Posner (that obviously implies that the freed slaves or their descendants could earlier have brought the action based on the date of publication of these works) is the citation to the two treatises, McManus, *Black Bondage in the North* 174 (1973) and Stampp, *The Peculiar Institution: Slavery in the AnteBellum South*, 397 (1956), works read almost entirely by specialists and which contain only the most general assertion as to the actions of northern merchants in the slave trade. In any event, such "general public awareness", *Thompson* at 50, does not put plaintiffs on inquiry notice of their claim. *Id.* Judge Posner sustained the dismissal on the ground that the action could have and, therefore, should have been brought at least as of the date of the publication of these two works. In point of fact, neither of these treatises would have supported the maintenance of an action for disgorgement of slave profits

as they do not identify the companies involved. *See, e.g.*, Stampp at 397 where the author refers only generally to the involvement of northern "merchants" in the slave trade. As the court recognized in *Thompson*, it is unreasonable to attribute such knowledge to the "reasonable" slave descendant. *Thompson, supra.*

Such arguments represent at best an attempt to controvert proofs that the plaintiffs would offer to demonstrate their inability to have brought these actions earlier due to the lack of knowledge as to the defendants' involvement in slave trading and financing, none of which was disclosed until at least 2002, the year in which the combined actions were filed. Such assertions as set forth in Judge Posner's opinion demonstrate at best the existence of a factual question as to when the former slaves and their descendants possessed sufficient knowledge to bring these actions, an issue not for the determination by the court as a matter of law but only as a matter of fact after an evidentiary hearing. *See, e.g., Thompson v. Metropolitan Life, supra* at 50 n.9. ("The determination of whether a plaintiff was put on 'inquiry notice' of his or her claim is clearly a question of fact.")

Every other circuit that has considered tolling questions has held that the question of when the plaintiff was first aware of the basis of her suit is not a question of law and is improperly determined on a motion to dismiss. *See, e.g., Mandarino v. Mandarino*, 2006 U.S. App. LEXIS 11927, 7-8 (2d Cir. 2006) (". . . the District Court should not have resolved the fact-specific equitable tolling issue on defendants' motion to dismiss."); *Coons v. Mineta*, 410 F.3d 1036, 1040-1041 (8th Cir. 2005) (reversing dismissal because District Court failed to hold evidentiary hearing on question of equitable tolling in discrimination action); *United States v. Battles*, 362 F.3d 1195,

1198 (9th Cir. 2004) (Because equitable tolling issues "are highly fact-dependent . . . we remand . . . to the District Court with instructions that it develop an adequate evidentiary record before again determining whether the statute of limitations should be equitably tolled as to those claims.); *Melendez-Arroyo v. Cutler-Hammer de P.R. Co.*, 273 F.3d at 39 (directing that District Court hold hearing on equitable tolling claims); *Beaird v. Seagate Tech.*, 145 F.3d 1159, 1175 (10th Cir. 1998), *quoting Delmar v. Raytheon Aircraft Corp.*, 1996 U.S. Dist. LEXIS 12913, No. 96-1002- JTM, 1996 WL 499144, at *7 (D. Kan. Aug. 9, 1996) ("Tenth Circuit cases 'indicate a detailed factual inquiry is necessary to determine whether equitable tolling should be applied,' requiring 'in all likelihood, an evidentiary hearing' ".).

As they did with this basic due process question, the courts below further misconstrued the notion of standing. Contrary to the Seventh Circuit and the District Court's repeated assumption, plaintiffs have repeatedly disavowed any claim of personal recovery from the defendants:

> Nowhere do the plaintiffs make the claim that they "are entitled to some of Defendants' profits" [citation to record below deleted]. Rather, their claim is that the defendants who attained ill-gotten profits through enslavement should not, under equitable principles, be permitted to retain such earnings that should be deposited into a public trust under cy pres principles. Disgorgement, being directed to depriving "wrongdoers of ill-gotten gains," *CFTC v. Hunt*, 591 F.2d 1211, 1222 (7th Cir. 1979), is "not [intended] to compensate the victims . . ." *Estate of Pidcock v. Sunnyland America, Inc.*, 726 F. Supp. 1322 (S.D. Georgia, 1989); *and plaintiffs make no such claim.*

Appellate Brief of Farmer-Paellmann at 12 [emphasis added].

Plaintiffs have repeatedly averred that they seek only an order that defendants disgorge their retained profits from slave financing and trading into a public benefits trust to benefit African American slave descendants under state law unjust enrichment principles. As this Court has noted, standing is not a rigid, inflexible doctrine and "often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *see also Allen v. Wright*, 468 U.S. 737, 751 (1984)(standing, even in light of "prudential" concerns, is a highly variable concept that must be tailored to the nature and character of the particular action, not employed as a reflexive instrument of dismissal). Plaintiffs' standing must therefore be seen in context of the nature of their requested remedy: since plaintiffs do not seek personal recovery, the courts below should not have conditioned their standing on proof of a direct link between their slave ancestor and individual defendants. Finally, it was error for the courts below to consider standing questions before the issue of tolling was determined.

Standing follows naturally from the resolution of the question of the date to which the action was tolled since the only persons who could commence the action are those in life at the time of tolling. It is self-evident that the inquiry as to standing of slave descendants to commence the action would be fundamentally affected by a finding that the action was tolled until 2002 or later, when the defendants began to admit their slave financing histories. If the action could not have been commenced earlier due to defendants' concealment of their slave financing and slave insuring acts, then it is self-evident that the only persons who could commence the action are the descendant alive today. Viewed in this light it was manifest error for the courts below to consider standing questions before a factual hearing on tolling of the period of

limitations., Since the former slaves themselves could not bring the action due to the defendants' concealment until at least the year 2002 of their slave financing and insurance acts, Farmer-Paellmann and the other plaintiffs in life today, not only have a concrete interest in the outcome of the litigation, *see, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1990), *citing Lujan v. National Wildlife Federation*, 497 U.S. 871, 883-889 (1990), but they are the only persons who could as theirs is the first generation to have the factual knowledge on which to commence the action.

For the trial court and the Seventh Circuit to have inferred on a motion to dismiss, in the absence of a hearing or evidentiary submissions, that the plaintiffs' actions could have been brought at some unstated earlier date based on the contents of two general works of history that make no reference to the defendants or their acts and to fail to accord an evidentiary hearing on the most basic issue in the case – the tolling question – is to deny basic due process in a matter of breathtaking historic dimensions that deeply and compellingly affects the public interest. The courts below abnegated their duty to protect these plaintiffs by failing to accord a hearing on the predicate factual issues in a case of the greatest historic magnitude. Plaintiffs and their ancestors were earlier prevented from bringing this action by the defendants' decades-long concealment of their slave financing and slave insuring past and were equally denied the right to try their claims by the unwillingness of the courts below to see this simple historical reality. If this Court does not accept the Petition, the opportunity to fully and fairly litigate these issues will be forever lost to this Nation.

B. The Supreme Court Must Decide The Limits Of Article III Standing.

The action should have been seen as akin to the toxic and mass tort claims in which plaintiff need only show proof of injury from the tort where proof of defendant's direct causation is not possible. *Dement v. Olin-Mathieson Chemical Corp.*, 282 F.2d 76, 82 (5th Cir. 1960) (citation omitted); *Hall v. E. I. Du Pont de Nemours & Co.*, 345 F. Supp. 353, 375 (E.D.N.Y. 1972).

As seen in *Dement*, *supra*, federal courts have recognized in certain circumstances that the absence of direct causation does not doom Article III standing and has been dispensed with in cases where it cannot be determined which of a group of collective wrongdoers caused an individual's harm:

> [C]ourts recognize joint liability against actors completely independent and unrelated to each other in circumstances where their conduct has caused indivisible injury which cannot be accurately apportioned and identified by the plaintiff.

Dement, 282 F.2d at 82; *Hall v. E. I. Du Pont de Nemours & Co.*, 345 F. Supp. at 375.

Where a wrong is known to have been imposed by multiple actors among a class of victims causing "indivisible injury which cannot be accurately apportioned and identified by the plaintiff," *Dement*, *supra*, liability can be imposed collectively among those known tortfeasors even without direct evidence of harm by a particular defendant to a particular plaintiff. Any contrary rule would enable tortfeasors whose acts are indivisible from one another and

which effectively enhanced each other's position, to escape liability. To avoid such unjust result, the federal courts have accepted "a shift of the burden of proving causation to the defendants." *Hall* at 374. Rather than dismiss the action for lack of individualized proof that any *particular* defendant victimized any *particular* ancestor or parent, the District Court should have denied the motion on the ground that defendants' collective conduct in slave trading, financing, insuring and profiteering causes the burden of proof to shift to the defendants. *Id.*, *citing* Rest. 2d Torts § 433B (1965). Certainly, on a motion to dismiss the presumption must favor plaintiffs and, in any event, such factual analysis must await a motion for summary judgment.

In *James v. Bessemer Processing Co.*, 155 N.J. 279, 301-302 (1998), the Court recognized the "formidable" difficulty in attributing direct liability to individualized defendants where the victims injuries arose over many decades from repetitive and multiple exposures. *Bessemer* at 301-302. Due to "the *unique* difficulties faced by a plaintiff attempting to establish causation in the toxic-tort context", *Id.* [emphasis added], the courts have accepted that circumstantial evidence may be used to establish liability of a group of collective tortfeasors." *See*, *e.g.*, *Bessemer* at 301 *citing Sholtis v. American Cyanamid Co.*, 238 N.J. Super. 8, 29; 568 A.2d 1196 (App. Div. 1990). Indeed, the asbestos cases and a host of other product liability cases have paved the way for the application of equitable principles to enable remedies in the absence of existing standards of liability. In *Sholtis*, the court recognized that the absence of "definitive standards" defining liability was no barrier to remand. *Sholtis* at 30.

As in the case of other mass torts where the defendants act in concert to distribute an anonymous source of injury,

the acts of defendants in financing slavery enabled the institution of slavery to function as an economic enterprise, causing harm to the persons enslaved through such purchases without knowledge of the tortfeasor's identify to the slave, with defendant contributing individually to the collective strength of the market in human beings. For Judge Posner to suggest proof of a direct link between the defendants and plaintiffs ancestors as a condition predicate to standing is to display a certain historical blindness to the true nature of slave financing in which the slave was kept ignorant of the parties financing his enslavement but was nevertheless grievously injured by tortfeasors that to the slave remain anonymous. This situation does not differ materially from the asbestosis or Agent Orange litigations in which products sold as a commodity causes injury to plaintiffs as to whom the manufacturer remains forever unknown. *See e.g.*, *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 833 (S.D.N.Y. 1984). As the federal courts have recognized, to impose direct causation as a predicate to standing in such cases would affect massive injustice, freeing the defendants of responsibility for undisputed liability.

Rather than simply dismiss the action because of its relative novelty, the District Court should have *first* sought to discern those standards that could be applied to this action of first impression, i.e., the disgorgement of wrongfully obtained profits from slave trading, financing and insuring. *Sholtis*, *supra*. Surely, this action presents "the unique difficulties faced by a plaintiff attempting to establish causation", *Bessemer* at 301-302, that requires the court to go beyond rigid rules of law and create equitable standards to enable the action to go forward.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CARL J. MAYER, ESQ.
MAYER LAW GROUP LLC
66 Witherspoon Street
Suite 414
Princeton, NJ 08542
(609) 921-0253

BRUCE I AFRAN
Counsel of Record
10 Braeburn Drive
Princeton, NJ 08540
(609) 924-2075

Attorneys for Petitioners